

***United States Court of Appeals
for the Second Circuit***



APPENDIX

To be argued by:

GEORGE SHEINBERG, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

77-1247

-----X

UNITED STATES OF AMERICA,

Appellee

Docket No. 77-1247

-against-

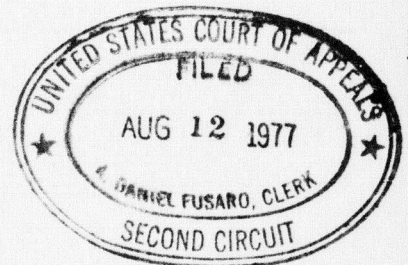
CARLOS RIVERA and LUIS ACEVEDO

Appellant

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B
P/S

APPELLANT'S APPENDIX



GEORGE SHEINBERG

ATTORNEY AT LAW
66 COURT STREET
BROOKLYN, N. Y. 11201

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

-against-

LOUIS ACEVEDO and
CARLOS RIVERA, "

Defendants.

----- X

THE GRAND JURY CHARGES:

I N D I C T M E N T

Cr. No. 77 CR 29
(T. 21, U.S.C., §841(a)(1)
§846 and T. 18, U.S.C.,
§2)

COUNT ONE

Commencing at a time unknown to the Grand Jury but beginning at least on November 4, 1976 and lasting at least until November 15, 1976, within the Eastern District of New York, the defendants LOUIS ACEVEDO and CARLOS RIVERA along with others known and unknown to the Grand Jury did conspire, agree and confederate to distribute a quantity of heroin hydrochloride, a Schedule I narcotic controlled substance in violation of Title 21, United States Code, Section 841(a)(1). (Title 21 United States Code, Section 846).

COUNT TWO

On or about the 15th day of November, 1976 within the Eastern District of New York, the defendants LOUIS ACEVEDO and CARLOS RIVERA did knowingly and wilfully distribute approximately 76.5 grams net weight of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1) and Title 18, United States Code, Section 2)).

COUNT THREE

On or about the 15th day of November, 1976 within the Eastern District of New York, the defendants LOUIS ACEVEDO and CARLOS RIVERA did knowingly and intentionally possess with intent to distribute approximately 76.5 grams net weight of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2)).

COUNT FOUR

On or about the 23rd day of September, 1976 within the Eastern District of New York, the defendant LOUIS ACEVEDO did knowingly and wilfully distribute approximately 48.6 grams net weight of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2)).

COUNT FIVE

On or about the 23rd day of September, 1976 within the Eastern District of New York the defendant LOUIS ACEVEDO did knowingly and intentionally possess with intent to distribute approximately 48.6 grams net weight of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

A TRUE BILL.

FOREMAN

DAVID G. TRAGER
UNITED STATES ATTORNEY
Eastern District of New York

1 my hands up".

2 MR. SHEINBERG: Objection, going over the same
3 thing that he went over in his direct summation.

4 THE COURT: Bring it to a close.

5 MR. GOULD: I am replying.

6 THE COURT: Bring it to a close.

7 MR. GOULD: And without going into detail remember
8 all the facts from the squatting and the leaning in
9 and the walking together and going to the car when the
10 drug dealer went down and looking at the drugs, and ask
11 yourselves if Rivera was just doing nothing or was he
12 participating actively in the drug transaction, and
13 based on the evidence and solely on the evidence in this
14 case, there can be no doubt much less a reasonable doubt
15 that these two defendants are guilty as charged.
16 Thank you very much.

17 THE COURT: I am now going to tell you what
18 the law is, ladies and gentlemen.

19 It is the Court's responsibility to instruct
20 you with respect to matters of law. It is your duty as
21 jurors to follow these instructions. It is your
22 responsibility and yours alone to judge the facts in
23 this case. You are the sole judge of the facts, not
24 counsel, not I.

25 I have no view of the guilt or innocence of these

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2 defendants. Nothing I have said or done should be
3 used by you in inferring innocence or guilt. You will
4 decide the case solely on the evidence before you and the
5 law.

6 The fact that this prosecution is brought in the
7 name of the United States does not entitle the Government
8 to any greater consideration than any other litigant.
9 All parties, Government and individuals are equal before
10 this Court. All parties are entitled to equal consideration.
11 ion. No party is entitled to sympathy or favor.

12 An indictment is an accusation in writing. It
13 is not evidence of guilt. It is entitled to no weight
14 in your judgment of the facts. If you like I could
15 send the indictment in and maybe that could help you.

16 Both defendants here pled not guilty.

17 The Government has the burden of proving guilt
18 beyond a reasonable doubt with respect to each element
19 of the crimes a defendant is charged with committing
20 and this burden never shifts throughout the trial. A
21 defendant does not have to prove his innocence. He
22 need not submit any evidence at all.

23 A defendant need not take the witness stand and
24 you may draw no inference unfavorable to him because
25 he does not testify.

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2 You may not consider the fact that a defendant
3 did not testify.

4 A presumption of innocence remains with a defendant
5 throughout the trial and must be considered by you in
6 your deliberations.

7 A reasonable doubt means a doubt sufficient to
8 cause a prudent person to hesitate to act in the most
9 important affairs of his life. Reasonable doubt may
10 result from the evidence produced or from failure to
11 produce evidence.

12 Finding an individual to be guilty of committing
13 a felony and subjecting him to criminal penalties is
14 most serious and you will consider this fact in deciding
15 whether you have a reasonable doubt. Nevertheless,
16 if at the end of the trial you are convinced beyond a
17 reasonable doubt that a defendant is guilty of a crime
18 charged then you should find him guilty of that crime.

19 The defendant Louis Acevedo is charged with five
20 counts, or crimes, and Carlos Rivera is charged with
21 three counts or crimes. Each count must be considered
22 separately by you. For example, you may find a defendant
23 guilty of one count without necessarily finding him
24 guilty of another crime. The fact that you find a
25 defendant guilty or not guilty or any parts of the count

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2 should not influence your verdict with respect to any
3 other count.

4 For the sake of convenience, the counts may be
5 divided into three groups. The first group, consisting
6 of Counts three and five, charges possession with intent
7 to distribute various amounts of heroin hydrochloride.

8 I shall read those counts to you first. Count
9 three charges that:

10 On or about the 15th day of November, 1976,
11 within the Eastern District of New York, the defendant
12 Louis Acevedo and Carlos Rivera did knowingly and
13 intentionally possess with intent to distribute approxi-
14 mately 76.5 grams net weight of heroin hydrochloride,
15 a Schedule one narcotic drug controlled substance.

16 Count five is the same, except that Louis Acevedo
17 is the only defendant named in the count. It reads
18 as follows:

19 On or about the 23rd day of September, 1976,
20 within the Eastern District of New York, the defendant
21 Louis Acevedo did knowingly and intentionally possess
22 with intent to distribute approximately 48.6 grams
23 net weight of heroin hydrochloride, a Schedule one
24 narcotic drug controlled substance.

25 These counts charge the defendant with possession

of heroin hydrochloride with intent to distribute it,
a violation of Section 841(a)(1) 21 of the United States
Code which provides in pertinent part:

"(a) . . . , it shall be unlawful for any
person knowingly or intentionally

"(1) to possess with intent to distribute a
controlled substance."

Heroin hydrochloride is a controlled substance
within the meaning of that section.

There are three elements to this crime. First,
that the defendant did in fact possess heroin.

The word "Possession" as I have used it in
defining this crime does not mean only actual physical
possession of the drug. It also means the dominion and
control of the drugs such that a defendant could move
them himself or cause others to move them as his agents.

Second, in order to find the defendants guilty
of violating this section, you must find that they
"Knowingly" or "Intentionally" possessed the heroin.

A person does not knowingly do an act if his
action resulted from a mistake, negligence or any other
innocent reason.

An act is intention if the defendant acts
voluntarily and with the specific intent to do something

the law forbids, that is to say, with the bad purpose either to disobey or to disregard the law.

Third, you must find beyond a reasonable doubt that the defendant, if he possessed the drug intended to distribute it.

Section 802 of Title 21(1) defines the word "Distribute" as meaning to deliver, and deliver has a simple, clear meaning; it means to transfer.

In considering Count three, it is not necessary for the Government to show that Mr. Acevedo and Mr. Rivera themselves performed all the acts necessary to establish the crime of possession with intent to distribute. Section 2 of Title 18 of the United States Code says that:

"(a) whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

This means that if you find a defendant was knowingly and wilfully aiding and abetting another in the commission of the crime of possessing heroin, but did so purposely, he is as guilty as if he were solely responsible for the planning an execution of the entire scheme.

In order for the defendant to be guilty of aiding

1
2 and abetting, it is necessary that there may be more
3 than mere presence and acquiescence in the crime itself.
4 There must exist some affirmative participation which
5 at least encourages the perpetrator. If you find that
6 the defendant Rivera intended by his presence either to
7 encourage Mr. Acevedo or to act as a guard in the
8 transaction, then the requirement of participation is
9 satisfied.

10 Please note, however, that Section two does not
11 apply to Count five. To find Mr. Acevedo guilty of
12 this crime, you must find that he did perform all ele-
13 ments of the crime itself.

14 Counts two and four, the second group of counts,
15 charge the defendant with actually distributing the
16 heroin hydrochloride mentioned in the earlier "possession"
17 counts. They read as follows:

18 Count two: On or about the 15th day of November,
19 1976, within the Eastern District of New York, the
20 defendants Louis Acevedo and Carlos Rivera did knowingly
21 and wilfully distribute approximately 76.5 grams net
22 weight of heroin hydrochloride, a schedule one narcotic
23 drug controlled substance.

24 Count four: On or about the 23rd day of
25 September, 1976, within the Eastern District of New York,

defendant Louis Acevedo did knowingly and wilfully distribute approximately 43.6 grams net weight of heroin hydrochloride, a schedule one narcotic drug controlled substance.

Please note that Count four applies only to defendant Acevedo.

These counts charge the defendant with distribution of heroin hydrochloride, violation of the part of Section 841(a) (1) of Title 21 of the United States Code which provides in pertinent part:

"(a)...., it shall be unlawful for any person knowingly and intentionally to (1) distribute a controlled substance."

Again, heroin hydrochloride is a controlled substance within the meaning of that section. There are two elements to this crime.

First, that the defendants, or someone with whom they were acting in concert, acted knowingly and intentionally. I have explained the meaning of the terms "knowingly" and "intentionally" to you earlier.

Second, that the defendants, or someone with whom the defendants were acting in concert, did in fact distribute the heroin hydrochloride. "Distribute," as I have said before, has a very simple meaning.

2 It means to hand it over or transfer whether for money
3 or not.

4 Again, under the terms of Section 2 of Title 18,
5 it is sufficient to find a defendant guilty on each
6 of the counts if you find that, rather than distributing
7 the drugs themselves, he aided, abetted, counselled,
8 commanded, induced or procured the commission of the
9 crime.

10 Finally, I shall read Count one to you. The
11 count charges Mr. Acevedo and Mr. Rivera with participat-
12 ing in an illegal conspiracy. It says that:

13 Commencing at a time unknown to the Grand Jury
14 but beginning at least on November 4, 1976, and lasting
15 at least until November 15, 1976, within the Eastern
16 District of New York, the defendants Louis Acevedo and
17 Carlos Rivera along with others known and unknown to the
18 Grand Jury did conspire, agree and confederate to
19 distribute a quantity of heroin hydrochloride, a
20 schedule one narcotic controlled substance in violation
21 of 21 United States Code, Section 841(a)(1).

22 The elements of the crime of conspiracy are
23 four.

24 First, that there be two or more persons involved;

25 Second, that they wilfully and knowingly con-

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spire, or agree;

Third, that they conspire to commit an act which is unlawful; and paragraph

Fourth, that one of the members of the conspi do an act to effect the object of the conspiracy.

Let me tell you about the first and second elements.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose or a lawful purpose by unlawful means. While it involves an agreement to violate the law, it is not necessary that the persons charged entered into an expressed or formal agreement, or that they stated, orally or in writing, what the scheme was or how it was to be effected. It is sufficient to show that they came to a mutual understanding to accomplish an unlawful act.

Such an agreement or conspiracy may be inferred from the circumstances and conduct of the parties, since ordinarily a conspiracy is characterized by secrecy. Mere innocent association as for social purposes or physical contact with conspirators does not make a person a co-conspirator.

I have already explained the concepts of knowledge and wilfulness.

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2 The third element that the Government must
3 prove beyond a reasonable doubt is that the conspiracy
4 be to commit an unlawful act. Possessing heroin hydro-
5 chloride with the intention to distribute it was un-
6 lawful during the entire period charged.

7 The fourth element that the Government must
8 establish beyond a reasonable doubt is that there be
9 an act to effectuate the conspiracy. This is called an
10 overt act. An overt act is required since, under our
11 law, it is not a crime to agree to do an unlawful act
12 if no physical action is taken to carry out that con-
13 spiracy.

14 One overt act is sufficient. An overt act
15 means any act committed by one or more of the co-conspir-
16 ators to accomplish a purpose of the conspiracy. The
17 overt act need not be in violation of the law, and
18 the other conspirators need not join in it, or even
19 know about it. It is necessary only that the act be
20 in furtherance of the purpose or objects of the conspiracy.

21 You are the sole judges of the credibility of
22 the witnesses and the weight their testimony deserves.
23 The assumption that a witness will speak the truth may
24 be dispelled by the appearance and conduct of the witness,
25 by the manner in which the witness testifies, by the

character of the testimony given, or by evidence contrary to the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and other matters in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness' intelligence, motive, state of mind, partisanship in the prosecution of the case and his demeanor and manner while on the stand. Consider particularly the relationship each witness bears to either side of the case, the manner in which each witness might be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

If you believe that a witness has wilfully sworn falsely before you with respect to a material element of the case, you may disregard his testimony in whole, or in part. But, a witness may have been mistaken or may have lied with respect to part of his or her testimony, and be accurate with respect to other parts.

You are not to give any greater weight or credibility to the testimony of a witness who testifies in this case solely because of the fact that he is an agent of the Government or a police officer or other

official. His or her testimony is to be evaluated in the same manner as you would evaluate the testimony of any other witness.

The mere number of witnesses and documents has no necessary relationship to the burden of proof.

Your recollection of the evidence governs.

If you wish to have some of the testimony repeated, you may make the request and I will call you into Court and have the reporter read those portions you desire to hear. You can have anything read back to you. I suggest, however, that you be specific to avoid reading testimony you do not desire to assist you in your deliberations.

If you are confused you may send in a note asking for help on the law.

You are entitled to your own opinions, but you should exchange views with your fellow jurors and listen carefully to each other. While you should not hesitate to change your opinion if you are convinced that another opinion is correct, your decision must be your own.

Any verdict you reach must be unanimous.

Your oaths sum up your duty and that is without fair or favor to any man, you will well and truly try the issues before these parties according to the evidence

given to you in Court and the laws of the United States.

Any objection to discharging the alternates?

MR. SHEINBERG: No objection.

MR. GOULD: No objection.

MR. REHBOCH: No objection.

THE COURT: The four alternates are discharged.
Go downstairs. Don't discuss the case with anybody
until the verdict is in.

Does counsel wish to see me at the side bar?

(Whereupon, a side bar conference was had.)

MR. SHEINBERG: No objection or additions.

MR. REHBOCH: No objection or additions to the
charge.

(Whereupon, side bar conference was concluded.)

All right, swear the marshals.

(Whereupon, the Clerk of the Court swore in two
U.S. Marshals in open court.)

THE COURT: All right, you may begin your deliberat-
ions.

(Whereupon, the Court stood in recess.)

(Whereupon, the Court reconvened at 4:30.)

THE COURT: Bring in the jury

(Whereupon, jurors returned to the courtroom and
are now seated in the jury box.)

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2 THE COURT: Mr. Clerk, take the jury verdict,
3 please.

4 THE CLERK: Mr. Foreman, will you please rise?

5 Take one defendant at a time. How do you find
6 the defendant Richard Acevedo as to Count one, guilty
7 or not guilty?

8 THE FOREMAN: Guilty.

9 THE CLERK: As to Count two, guilty or not guilty?

10 THE FOREMAN: Guilty.

11 THE CLERK: As to Count three, guilty or not
12 guilty.

13 THE FOREMAN: Guilty.

14 THE CLERK: As to Count four, guilty or not
15 guilty?

16 THE FOREMAN: Guilty.

17 THE CLERK: As to Count five, guilty or not
18 guilty?

19 THE FOREMAN: Guilty.

20 THE CLERK: How do you find the defendant, Carlos
21 Rivera as to Count one, guilty or not guilty?

22 THE FOREMAN: Guilty.

23 THE CLERK: As to Count two?

24 THE FOREMAN: Guilty.

25 THE CLERK: As to Count three, guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: Mr. Foreman and ladies and gentlemen of the jury, as the Court has received your verdict, you say you find the defendant Richard Acevedo guilty as to Count one, two, three, four and five; and you say you find the defendant Carlos Rivera guilty as to Counts one, two, and three?

THE FOREMAN: Yes.

THE COURT: Poll the jury please.

(At this point all twelve jurors were polled as to their verdict, each answer in the affirmative.)

THE COURT: Is there any reason why the jury should not now be discharged?

MR. COULD: No, your Honor.

MR. SHEINBERG: No, your Honor.

MR. RIMBOCH: No, sir.

THE COURT: Will you report downstairs. Thank you for your help.

MR. SHEINBERG: Will your Honor continue the bail on the defendant?

THE COURT: Any objection?

MR. COULD: Yes, your Honor. Quite frankly the defendant change addresses without notifying anybody, and we have every reason to believe that these people,

U.S. DEPT. OF JUSTICE
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EAST. DIST. N.Y.

Joseph A. Edwards